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Parental Rights and the Ugly Duckling

MARGARET F. BRINIG AND F.H. BUCKLEY*

He had been persecuted and despised for his ugliness, and now he heard them say he was the most beautiful of all the birds. Even the elder-tree bent down its bows into the water before him, and the sun shone warm and bright. Then he rustled his feathers, curved his slender neck, and cried joyfully, from the depths of his heart, "I never dreamed of such happiness as this, while I was an ugly duckling."¹

Hans Christian Andersen's "The Ugly Duckling" is best remembered for its moral, "To be born in a duck's nest, in a farmyard, is of no consequence to a bird, if it is hatched from a swan's egg." Having read and thought about this story many times, we should like to suggest another, less heart-warming, interpretation. The story of the Ugly Duckling, that most resilient of cygnets, masks the tragedy of children who suffer abuse. Its message, that personal spirit will triumph when a child grows up, misrepresents the experience of many victimized children. If we wait for the child to turn into a swan, we will often be sadly disappointed. More troubling is the evidence that "different" children are more likely to be subjected to repeated abuse by parents or guardians.

The Ugly Duckling is the best swimmer of them all. But as he is different, and does not seem able to do anything useful, he is rejected by his mother, rebuffed by his brothers and sisters, picked on by the other ducks in the barnyard, and scorned by other animals. He is left to freeze and starve in the wild. Yet after a year has passed, he has become the most beautiful of all the birds.

If a child is seen as ugly (whether disabled or merely inhibiting the parent's romantic relationships), she may suffer many of the torments of the Ugly Duckling. But "The Ugly Duckling" is a fairy tale. The ugly child seldom emerges as a beautiful swan. Instead, she is more likely to be scarred emotionally, if not physically. Abused children do not fare as well in school, as

* We gratefully acknowledge the support of the George Mason University Law and Economics Center, and the excellent suggestions from workshops at the University of Virginia, Georgetown Law Center, Cornell Law School and the University of Toronto, Faculty of Law.

¹ Hans Christian Anderson, "The Ugly Duckling", from *Fairy Tales of Hans Christian Anderson* (1946) [1872].

adults, and particularly as parents.² They make up a tragically large proportion of criminals³ and those who never seem to be able to adjust.⁴

This paper reexamines child abuse from the victim's perspective. Most of the literature on child abuse, as well as treatment of the subject in law schools, focuses on the adult abuser: Was there abuse in the adult's family? Were appropriate social services provided? What form did the abuse take? Did police respond appropriately? Was the correct level of due process provided? Can the adult be reunited successfully with the child? How closely does abuse correlate with poverty? This focus is important, for in order to do the unthinkable, abuse one's own child, the parent must be in some or many ways abnormal.

We ask a much simpler set of questions, given the fact that a given parent may, under the right set of circumstances, abuse a child. Why are particular children picked on? What makes them less attractive in the eyes of the adults who care for them? What should be done to protect such children from repeated abuse?

Section I suggests that victims of abuse are often different from other children. Like the Duckling, they might not seem useful to the adults who care for them. They might be disabled and in need of ongoing care. Their needs might interfere with the abusing parent's other adult relationships. We describe all of these traits as ugliness.

Section II discusses several reasons why parents might value the ugly child less than their more attractive children. From an economic perspective, the ugly child is less likely to be successful, and less able to look after his parents in their old age. As such, he is less valuable to them and they might invest less in his care. He might also be more costly over the short run. We might thus expect parents to invest less heavily in the ugly child. One form such investments take is the special emotional that makes it painful for parents to abuse their children, and we would therefore expect that ugliness would be correlated with higher rates of child abuse.

Economic explanations of child abuse overlap with explanations from the perspective of sociobiology. The ugly child is less likely to have offspring, and might interfere with offspring by the current love interest of the parent. The "selfish gene" might then mark out the ugly child for active mistreatment.⁵ Both

² They have trouble finding friends, lovers, and acquaintances, and frequently end up in abusive relationships. ELIANA GIL, *OUTGROWING THE PAIN: A BOOK FOR AND ABOUT ADULTS ABUSED AS CHILDREN* (Dell Publishing Company, New York, 1988); ALICE MILLER, *THOU SHALT NOT BE AWARE: SOCIETY'S BETRAYAL OF THE CHILD* (1984).

³ See, e.g., RICHARD J. GELLES & CLAIRE P. CORNELL, *INTIMATE VIOLENCE IN FAMILIES* 59 (1985).

⁴ See, e.g., *id.*, at 19-20.

⁵ RICHARD DAWKINS' *THE SELFISH GENE* (1976) was one of the first books to explore these themes, which now form the basis of a very substantial literature. A recent and very thorough review appears in

economic and biological explanations might explain why, from a psychological perspective, ugly children are less lovable. They may be more difficult, cause more stress in the family, and bring less emotional satisfaction than their siblings.⁶

Child abuse is rightly regarded as abhorrent. The idea that ugly children are marked out for abuse in an economic or evolutionary calculus is rather ugly itself, particularly when the winnowing occurs in the heart of a family. In offering explanations for why parents might abuse the ugly child, we do not wish to rationalize immoral behavior. But it is also wrong to ignore the factors which suggest that children are at risk when determining whether they should be taken from their parents. We therefore test these theories in Section III, through a multiple regression analysis of the determinants of child abuse from a sample of victims. We find that whether a child is disabled—one measure of ugliness—is a significant predictor of subsequent child abuse or neglect.

Section IV then discusses possible responses to the problem we identify. We cannot usually make children beautiful, at least in a physical sense. Yet we may act more quickly to protect abused children, particularly those who might be regarded as ugly and therefore likely to suffer repeated abuse. Our empirical findings suggest that ugliness—caused by disability or a parent romantically involved with a non-parent—be taken into account when deciding whether to terminate parental rights as opposed to reunify the family.

To one unfamiliar with child protective law, this might seem to impose a double hardship on the “ugly” child: not merely is she disadvantaged in life’s race, but she is also to be taken from her parents and placed in an unknown environment. More than most children, the disabled child may benefit from loving parents. But when the child is likely to be repeatedly abused by parents, separating them is very much in the child’s best interests. At present, there is good reason to think that too much weight is placed on parental rights after abuse has occurred, and that children should be taken from abusive parents more often. Because of this, we think that taking “ugliness” into account in child placement situations is unlikely to do more harm than good.

I. WHEN IS A CHILD THOUGHT UGLY?

The poor duckling was driven about by every one; even his brothers and sisters were unkind to him, and would say, “Ah, you ugly creature,

Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 Ariz. L. Rev. 971 (1995).

⁶ Robert E. Emery & Lisa Laurman-Billings, *An Overview of the Nature, Causes, and Consequences of Abusive Family Relationships: Toward Differentiating Maltreatment and Violence*, 53 Am. Psychologist 121, 126 (1998).

I wish the cat would get you," and his mother said she wished he had never been born. The ducks pecked him, the chickens beat him, and the girl who fed the poultry kicked him with her feet.

As Martha Minow notes, living with people who are different, who are ugly or disabled in some way, may enrich our lives.⁷ But that is a counsel of perfection, and many parents do not see it that way. They will prefer their "beautiful" to their ugly children, their healthy to their disabled offspring.

A child may be seen as ugly in a variety of ways. Most obviously, their faces or bodies might not be perfectly symmetrical,⁸ and they may not respond as quickly to parental attention. Thus the premature child might be harmed not only because he is malformed, but also because he must spend many days in intensive care apart from his parents,⁹ so they do not see him as an attractive child when he is finally released to their care.¹⁰

Throughout their lives, beautiful people are revered by a society that rewards vigor and youth.¹¹ They are popular as dates and chosen early as mates. The most beautiful of all may grace magazine covers or feature films. Ugly

⁷ MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1991).

⁸ Geoffrey Cowley, *The Biology of Beauty*, 127 *Newsweek* 60 (June 3, 1996).

⁹ See, e.g., Mary I. Benedict et al., *Reported Maltreatment in Children with Multiple Disabilities*, 14 *Child Abuse and Neglect* 207-17 (1990); William N. Friedrich & Jerry A. Boriskin, *The Role of the Child in Abuse: A Review of the Literature*, 46(4) *Amer. J. Orthopsych.* 580-90 (1976); Ann L. Frodi, *Contribution of Infant Characteristics to Child Abuse*, 85 *Am. J. Mental Deficiency* 341-49 (1981); Roger White et al., *Physical Disabilities as Risk Factors for Child Maltreatment: A Selected Review*, 51 *Amer. J. Orthopsych.* 93, 96 (1987).

¹⁰ See, e.g., Diane Ackerman, *The Magic Touch: Nothing May be More Important to a Baby Than Physical Contact*, 12 *Amer. Health* 70 (1993); Tim Beardsley, *Different Strokes: Premature Infants Gain from Being Handled*, 261 *Scientific American* 34 (1989); Bruce Bower, *Different Strokes: The Touch of a Hand and Sway of a Bed Can Have Far-Reaching Effects on Premature Babies Encased in Incubators*, 128 *Science News* 301 (1985); Mary Lou Hulseman & Lee A. Norman, *Fundamentals of Outpatient Care: The Neonatal ICU Graduate*, pt. 2, 45 *American Family Physician* 1696 (1992); Saul M. Schanberg & Tiffany Field, *Sensory Deprivation Stress and Supplemental Stimulation in the Rat Pup and Preterm Human Neonate*, 58 *Child Development* 1431-47 (1987).

Premature infants are at increased risk for physical abuse and neglect. Bower, *supra* at 301; K.K. Minde, *The Impact of Prematurity on the Later Behavior of Children and on their Families*, 11 *Clin. Perinatal.* 227-33 (1984).

¹¹ See, e.g., MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* 297-306 (Macmillan, 1993); Lloyd Cohen, *Marriage, Divorce and Quasi-Rents, Or: "I Gave Him the Best Years of My Life,"* 16 *J. Legal Stud.* 269 (1987). Shortness of stature might even be seen as ugliness. Rick Weiss, *Pediatrics—Hormones for Short Children*, the *Washington Post*, January 20, 1997 at A2, reports on concerns by the American Academy of Pediatrics about the distributional effects of giving hormone shots to short children. "[B]ecause wealthy families can better afford the treatment, the Academy worries about a future filled with rich tall people and poor short ones."

people are discriminated against in job¹² and marriage markets.¹³ These tendencies are mutually reinforcing. For example, the child who seems less likely to be able to reproduce may be seen as more ugly.¹⁴ Ugliness might be overlooked if the person is thought useful, and can compensate the lack of comeliness. Aphrodite might have enjoyed her dalliance with Ares, but for a husband chose a bandy-legged fellow with a useful trade.

"Can you lay eggs?" she asked. "No." "Then have the goodness to hold your tongue." "Can you raise your back, or purr, or throw out sparks?" said the tom cat. "No." "Then you have no right to express an opinion when sensible people are speaking."

Yet physical attraction may better explain breeding patterns than mere usefulness, as Hephaestus learned to his dismay. Ugly children are less likely to marry and rear children. As a consequence, they are less likely to be able to support their parents in old age,¹⁵ and if disabled may even be unable to support themselves.¹⁶ They are therefore seen as a burden to their parents,¹⁷ who might even seek damages for their "wrongful birth."¹⁸ Since they are less valuable from a genetic standpoint, they are more apt to be abused by their parents.

"That is impossible, your grace," replied the mother; "he is not pretty; but he has a very good disposition, and swims as well or even better than the others. I think he will grow up pretty, and perhaps be smaller; he has remained too long in the egg, and therefore his figure is not

¹² See, e.g., *Bd. of Curators of Univ. Of Missouri v. Horowitz*, 435 U.S. 78 (1978); Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 *Amer. Econ. Rev.* 1174-94 (1994); Peter Passell, *An Ugly Subject: The Prejudice Against Hiring Homely People*, *New York Times*, Jan. 27, 1994 at 2.

¹³ Again, Anderson on the ugly duckling:

He bowed to them, and was as polite as he could be, but he did not reply to their question. "You are exceedingly ugly," said the wild ducks, "but that will not matter if you do not want to marry one of our family."

¹⁴ Ridley, *supra* note 11, at 146-49.

¹⁵ RICHARD A. POSNER, *AGING AND OLD AGE* 220-22 (Chicago: U. Chicago, 1995) and Margaret F. Brinig, *Finite Horizons: The American Family*, 2 *Intl J. of Children's Rts.* 293 (1994), both discuss support of the elderly by their adult children. While the child who does not marry and stays at home might provide the parent physical care in old age, LAURA ESQUIVEL, *LIKE WATER FOR CHOCOLATE* (1992), we suspect that marrying off one's children is a better insurance policy.

¹⁶ One article points out that the birth of a child with a physical or mental disability begins a mourning process with specific stages of resolution, characterized by "chronic, relentless stress." Roger White et al., *Physical Disabilities as Risk Factors for Child Maltreatment: A Selected Review*, 57 *Amer. J. Orthopsych.* 93 (1987) (citing M. Murphy, *The Family With a Handicapped Child: A Review of the Literature*, 3 *Developmental and Behavioral Pediatrics* 73 (1982)).

¹⁷ See, e.g., *Harmatz v. Harmatz*, 457 A.2d 399 (D.C. 1983), (father unsuccessfully seeks to stop providing support for his adult, disabled son).

¹⁸ *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1979) (Down's syndrome child; parents not told of the risk at their ages).

properly formed;" and then she stroked his neck and smoothed the feathers, saying, "It is a drake, and therefore not of so much consequence. I think he will grow up strong, and able to take care of himself."

The "ugly" child might simply be slow of understanding. The dull-witted child is less responsive to his parents, who will find him less rewarding as a consequence. As Yeats suggested, pleasing virtues might compensate for a lack of beauty.

In courtesy I'd have her chiefly learned;
Hearts are not had as a gift but hearts are earned
By those that are not entirely beautiful.¹⁹

But what if the child is not only ugly, but also too slow and surly to win affection?

The child who has learning disabilities is particularly ugly.²⁰ He might have just as many chances as the average person to reproduce,²¹ and may well enjoy a productive life as an adult. However, the parents of a learning-disabled child, especially a bright one, will find the school years much more frustrating, and more expensive, than they would with a normal child.²² The parent must "run

¹⁹ W.B. Yeats, *A Prayer for my Daughter*, in *THE COLLECTED POEMS OF W.B. YEATS* 185, 186 (1956).

²⁰ For example, an 11-year old boy was recently killed by his father for being unable to tell time. The child's great-grandmother said that he was a slow learner and was attending special education classes. Sari Horwitz, *Father Is Charged in Beating Death of District Boy*, *Wash. Post*, May 1, 1997, at A1.

²¹ Indeed, many learning-disabled children are more physically beautiful than the norm. Because of their scholastic limitations, they frequently attempt to prove their worth (and achieve positive recognition) by being sexually active. They may be therefore be more likely to have children out-of-wedlock. Although this increases the parents' genetic offspring, unwed births themselves strain families. In addition, since many learning disabilities seem to "run in families," these are not necessarily genes that one would want reproduced because the children are less likely to be financially successful.

²² For examples, see Lawrence E. Frisch & Frances A. Rhoads, *Child Abuse and Neglect in Children Referred for Learning Evaluation*, 15 *Journal of Learning Disabilities* 583 (1982). The authors found three times the expected number (assuming a normal population) of abused children who were in a learning disabled population in Hawaii, and hypothesized that:

children who have difficulty in comprehending information or who are hyperactive with poor control of attention may be inherently more difficult to manage and hence invite harsh and potentially abusive punishment. In such a model abuse is a consequence of preexisting cognitive, temperamental, or attentional abnormality.

Id. at 585. See also Elisabeth Krents, Valerie Schulman, and Sheila Brenner, *Child Abuse and the Disabled Child: Perspectives for Parents*, 89 *The Volta Review* 78 (1987):

Some parents do not successfully cope with a disabled child, whose presence may be a constant

interference" with school authorities and continually set limits for the child. There may be special education needs or trips to a counselor or medication. All this stretches the parents' capacity and limits leisure time.²³ Further, the child with hyperactivity or attention deficit disorder will frequently be emotionally taxing for the parent.²⁴ This is of course a cost, in financial, time, and psychological terms. For the parents of an eccentric genius, the problems of raising the child may be compensated by the enormous respect earned when the genius reaches adulthood. For the disabled (and particularly the mentally handicapped) child, such compensations are highly unlikely.²⁵

The child who is in the way may also be seen as ugly. For example, the child of a single mother might impede her chances on the marriage market, or interfere with a new romantic interest.²⁶ Second marriages involving children of prior relationships stand a much greater chance of dissolving.²⁷ This child's unattractiveness may also emanate from a biological concern. The parent or step-parent may consciously or unconsciously feel that the child competes for the other adult's affection,²⁸ thus threatening the mate's chances for producing

reminder of disappointed aspirations, perceived punishment, or embarrassment. A disability can also create social and economic pressures that further strain family relationships and budgets, increasing the general level of stress.

Id. at 83 (citing generally SHARON R. MORGAN, *ABUSE AND NEGLECT OF HANDICAPPED CHILDREN* (1987)).

²³ In a context that is similar because of the amount of time that must be diverted to the "special" child, one article suggests that families "with premature infants endure a variety of psycho social stresses... They may be worried about long-term development, and they are often burdened with large hospital bills and ongoing medical expenses. Premature infants may require a tremendous investment of time, energy and patience. Siblings can become jealous and should be persuaded to help care for the infant whenever possible." Mary Lou Hulseman & Lee A. Norman, *Fundamentals of Outpatient Care; The Neonatal ICU Graduate*, 45 *Amer. Family Physician* 1696 (1992). See generally Susan J. Zuravin, *The Ecology of Child Abuse and Neglect: Review of the Literature and Presentation of Data*, 4 *Violence and Victims* 101-20 (1989) (unplanned children and children in larger families are at greater risk for abuse). On mental retardation, see William N. Friedrich and Jerry A. Boriskin, *The Role of the Child in Abuse: A Review of the Literature*, 46 *Amer. J. Orthopsychiat.* 580, 583-84 (1976) (reporting that 25 to 55% of children in various studies of abused children were classified as mentally retarded).

²⁴ See, e.g., Stanley R. Friedman, *The Need for Intensive Follow-Up of Abused Children*, in *HELPING THE BATTERED CHILD AND HIS FAMILY* (C. Jempe and R. Helfer, eds., 1972). Friedman suggests that some abused children are hyperactive or intellectually precocious.

²⁵ For an account of the frustrations of one such parent of a child who suffered from Fetal Alcohol Syndrome, see MICHAEL DORRIS, *THE BROKEN CORD* (1989).

²⁶ Martin Daly & Margo Wilson, *Child Abuse and Other Risks of Not Living with Both Parents*, 6 *Ethology & Sociobiology* 197 (1985); Joy L. Lightcap et al., *Child Abuse: A Test of Some Predictions from Evolutionary Theory*, 3 *Ethology & Sociobiology* 61 (1982).

²⁷ Gary S. Becker et al., *An Economic Analysis of Marital Instability*, 85 *J. Pol. Econ.* 1141 (1977). More recently, 47% of couples divorcing where the wife had a previous marriage had children. Sally C. Clarke, *Advance Report of Final Divorce Statistics*, 1989 and 1990, Vol. 43, No. 9, Supplement, National Center for Health Statistics (March 22, 1995). Many of these children were from prior marriages.

²⁸ Psychologists and economists suggest that many of a child's actions are influenced by a competition with his parents. See generally SIGMUND FREUD, *BASIC WRITINGS OF SIGMUND FREUD* trans. A.A. Brill (1995); Gary S. Anderson & Robert Tollison, *A Theory of Rational Childhood*, 7 *Eur. J. Pol. Econ.* 199

offspring from the new relationship,²⁹ or, from a psychological perspective, threaten the ongoing adult relationship.

II. UGLINESS AS A COST OR THREAT

In all of these ways, the “ugly” child is less rewarding, more costly, or perhaps more threatening than an attractive child. Many of the costs are non-pecuniary, but some have a clear dollar sign attached. In part, parents look to their children as a source of support when the parents are retired, or at least not as a lifetime drain on the parents’ budget.³⁰ When a child’s ugliness makes him less employable, then, the parents have a weaker incentive to invest in their child. Where the child is attractive, industrious and bright with a greater earning capacity, parents have greater incentives to make human capital investments in education and greater emotional investments through a loving, caring relationship.³¹

The social contract might span several generations. Parents might support the child in return for the child’s promise to be independent, to support his own children rather than his parents. For the parents, this increases the likelihood that the parents’ name and reputation will survive into the future.³² In that case, the “ugly” child who is unlikely to reproduce successfully or support his own offspring is less valuable than the attractive child.

(1991). A sociobiological explanation for abuse by step-parents is suggested by Owen D. Jones, *Evolutionary Analysis in Law: A Model for Analysis and its Application to Child Abuse*, 75 North Carolina Law Review 1117 (1997). Jones hypothesizes that stepparents, because of their lack of genetic connection with the child, will be more likely to abuse than natural parents.

²⁹ Judith Seltzer reports that men in particular are far more attached to the children of a new relationship than children of a prior one with whom the man no longer lives. Judith A. Seltzer, *Consequences of Marital Dissolution for Children*, 1994 Amer. Rev. Soc. 235 (1994).

³⁰ Less so after the rise of the Welfare State, whose distributional benefits must be weighed against the costs of a weakened family structure.

³¹ Gary Becker has pioneered economic explanations of child-raising. See, e.g., *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. Pol. Econ. 385, 398–99 (1993); Gary S. Becker and H. Gregg Lewis, *On the Interaction Between the Quantity and Quality of Children*, 71 J. of Pol. Econ. S279 (1973); Gary S. Becker and Nigel Tomes, *Child Endowments and the Quantity and Quality of Children*, 74 J. Pol. Econ. S143 (1976). For a recent empirical study of parental investment, see Brinig, *supra* note 15.

³² For an indication that that is occurring in parents’ investments in the child’s human capital (education), see John N. Langbein, *The Twentieth-century Revolution in Family Wealth Transmission*, 86 Mich. L. Rev. 722 (1988). Paul Samuelson’s life cycle model (unlike that of Milton Friedman) assumes a concern for future generations. *An Exact Consumption-Loan Model of Interest with or Without the Social Contrivance of Money*, 66 J. Pol. Econ. 467–82 (1958).

Economic theories of this kind overlap with the rapidly growing field dubbed "sociobiology"³³ or "evolutionary psychology,"³⁴ which attempts to explain physical and behavioral differences by reference to evolutionary survival strategies. As genes determine a large part of one's looks, capacities and character traits, these scholars consider them the engine of evolutionary change. Sociobiologists see the gene as programmed to replicate itself, using the body in which it is from time to time lodged as a way-station. The most successful genes are those best able to reproduce successfully, when an individual produces the most offspring who will be able to carry on successfully in the world.

Because it is less well known and more controversial,³⁵ we will describe sociobiology at slightly greater length than the other explanations for the behavior we identify. Those who accept the biological roots of human behavior use it to explain a surprising amount of family-related activity. For example, Wright suggests that the prominence of infidelity in human relationships is due to "infidelity genes," which proliferated because the people who were unfaithful had the highest number of healthy offspring.³⁶ Sociobiology also predicts behavioral differences between the sexes, since they have different requirements for passing on genes. Men will opt for youth and beauty, since they want a mate who is healthy and able to care for the child; women prefer financial stability, since this will permit them to care for the child.³⁷ Sociobiology may also account for the common perception that men are less discriminatory in choosing sexual partners: a man has a virtually limitless supply of sperm compared to the small number of ovum a woman produces. Women must choose a few good partners to gain the highest possible chance of passing on their genes to healthy offspring with each sexual encounter.³⁸

Sociobiological theories provide an explanation for the presumption of parental fitness (as opposed to third parties unrelated by blood or adoption), with a selfish parental gene seeking to ensure its survival across time in the replicated genes of offspring.³⁹ But sociobiological theories also suggest that a disabled or

³³ See, e.g., EDMUND WILSON, *SOCIOBIOLOGY* (1975); MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE*, (1993).

³⁴ See, e.g., ROBERT WRIGHT, *THE MORAL ANIMAL*, (1994); Robert Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. Rev. Biology 37 (1971).

³⁵ Sociobiological discussions are, however, beginning to appear in mainstream social science journals. See, e.g., Emery & Lauman-Billings, *supra* note 6, at 127; Steven L. Nock, *The Consequences of Premarital Fatherhood*, 63 Am. Soc. Rev. 250, 251 (1998).

³⁶ Wright, *supra* note 34.

³⁷ Matt Ridley, *supra* note 11.

³⁸ For a discussion of parenting as requiring a "crescive bond," linking irreplaceable individuals into a continuing relationship, see Elizabeth S. Scott & Robert Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401, 2434 (1996).

³⁹ Richard Epstein, *Justice Across the Generations*, in *THE DIALOGUE OF JUSTICE, TOWARD A SELF-REFLECTIVE SOCIETY* 84, 89 (Peter Laslett & James S. Fishkin, eds.) (1992) ("The most powerful source of this interdependence is genetic connection, which induces parents to take into account the utility of their children

unattractive child will be less successful at passing along a parent's genes, and will therefore threaten the parent and be a target for direct abuse.⁴⁰ In addition, the child who interferes with the parent's new romantic relationship competes directly with the selfish gene.⁴¹ The other adult or even the parent might harm or "eliminate," this threat to the relationship (and potential offspring with the new partner).

For all or any of these reasons, the child seen as ugly by his parents may be ignored (neglected or abandoned) by them. He may be picked on by siblings, or, tragically, may be the target for abuse by the adults closest to him. With all the attention paid to abuse over the last ten years, lawyers and other policy makers have concentrated on those parental characteristics that make abuse more likely. They have, perhaps because of a desire not to blame the child-victim, ignored the child's traits we identify here as "ugliness."

Regardless of the source of the problem—whether the competition or disaffection is financial, genetic, or psychological—there is reason to suspect that parents of disabled children who have abused are less likely to profit from reunification services than those who are not. Likewise, if a parent or other caregiver is choosing a new mate rather than the child and therefore physically abuses the child or permits abuse, preventing escalation of the abuse or other harm to the child seems to trump "parental rights." This paper, therefore, hypothesizes that children seen as "ugly" by their parents will be far more likely to be repeatedly abused than healthy children. We turn now to an empirical test of these theories.

III. AN EMPIRICAL TEST

This Section reports on a test of whether parents are more likely to abuse their disabled than their other children. Our data comes from a panel set prepared by Cornell University researchers,⁴² drawn from a national sample of abused children and their families taken in 1991.⁴³ The abuse cases were matched with

... in making decisions about present and future consumption").

⁴⁰ William N. Friedrich & Allison J. Einbender, *The Abused Child: A Psychological Review*, 12 J. Clinical Child Psych. 244–56 (1983) (higher rates of abuse among disabled children).

⁴¹ Daly & Wilson, *supra* note 26, Lightcap et al., *supra* note 26. Evolutionary psychologists have pointed to risks of jealousy and "mate guarding" as well as the protective function for genetics as factors in abuse. See, e.g., Robert L. Burgess et al., *Violence to the Family*, in, LIFE SPAN DEVELOPMENTAL PSYCHOLOGY: NONNORMATIVE EVENTS (E.J. Callahan & K. McCluskey, eds.) (1983); Martin Daly & Margo Wilson, *Violence Against Stepchildren*, 5 Current Directions in Psychological Science 77 (1996).

⁴² *The Maltreatment of Children with Disabilities and Child Maltreatment in Substance Abusing Families* (1991), SIB-068, from the National Data Archive on Child Abuse and Neglect, Family Life Development Center, Cornell University.

⁴³ The sample consisted of 36 agencies, or "primary sampling units," in which a total of 1249

300 cases of children with disabilities (prior to any abuse) from the same counties.⁴⁴

Because all the sampled (reported) families had at least one abused child, there was no obvious "normal" group to act as a control. We therefore concentrated on families containing at least two children, to see whether the disabled or otherwise ugly child was more likely to be "picked on."⁴⁵ Table II reports on a study of a group of 212 children from 75 families with two or more children, who had abused one but not all of the children.⁴⁶

We believed that disabled children were more likely to be abused than other children. We also expected that child abuse and neglect might be correlated with other factors, such as the child's age, gender, and whether she might be a threat to adult "competitors" in the home.⁴⁷ We sought to determine whether these characteristics would be similar for children who were neglected as well as those physically abused.

We estimated the likelihood of abuse and neglect through a probit model, which considers binary choices when one of two alternatives (abuse or no-abuse; neglect or no-neglect) must be chosen. In reduced form, we estimated the probability of abuse or neglect through equations estimating the characteristics of two types of mistreatment in those families where not all children were abused.

substantiated abuses had occurred over a 4 to 6 week period in 1991. Notably, there were only 512 families involved, strongly suggesting repeat abuse in many these families (with an average of more than two incidents in a single year). To eliminate bias caused by multiple reports, we concentrated on the first abuse incident listed for each family.

⁴⁴ Of the 300 children with disabilities, 81 were abused, for an average of 0.269103. (See AH05.dif) Corresponding overall national figures for 1991 indicate that an average of 4.2 children per thousand were abused, for an average of .024, less than one-tenth as high.

⁴⁵ There were 512 such families that had full information including the ages and physical conditions of all the children, and where parents or other relatives, as opposed to outsiders, abused the child. Abuse was identified as physical assault, sexual abuse, emotional abuse, physical neglect, medical neglect, abandonment, expulsion, inadequate supervision, inattention to special education need, other specified educational neglect, inadequate nurturing or affection, refusal or delay of psychological care, other specified emotional neglect, other specified maltreatment, and drug/alcohol toxicology, addiction or abuse in the child. See *National Data Archive on Child Abuse and Neglect, The Maltreatment of Children with Disabilities Study*, Dataset Documentation, Appendix A: Codebook Information for AHNRC3 at 6 (1996). We classified physical assault, sexual abuse, and emotional abuse as abuse cases, and the rest as neglect cases.

⁴⁶ We omitted 13 children from families where the ages of some children in the family were coded "don't know" or "not available."

⁴⁷ In the analysis reported here, we could not run the usual ordinary least squares regression, but needed to look at the *probability* that a particular child would be abused based upon the various factors. This type of multivariate analysis is called probit. All statistical work was done using the computer software SHAZAM. SHAZAM User's Reference Manual Version 89.0, (1997.)

Equations

$$(1) \text{NEGLECT}_i = \beta_0 + \beta_1 \text{DISABLE}_i + e$$

$$(2) \text{NEGLECT}_i = \beta_0 + \beta_1 \text{DISABLE}_i + \beta_2 \text{STEP} + \beta_3 \text{SEXAGE} + e$$

$$(3) \text{NEGLECT}_i = \beta_0 + \beta_1 \text{DISABLE} + \beta_2 \text{STEP} + \beta_3 \text{AGE} + \beta_4 \text{SEX} + e$$

$$(1) \text{ABUSE}_i = \beta_0 + \beta_1 \text{DISABLE}_i + e$$

$$(2) \text{ABUSE}_i = \beta_0 + \beta_1 \text{DISABLE}_i + \beta_2 \text{STEP} + \beta_3 \text{SEXAGE} + e$$

$$(3) \text{ABUSE}_i = \beta_0 + \beta_1 \text{DISABLE} + \beta_2 \text{STEP} + \beta_3 \text{AGE} + \beta_4 \text{SEX} + e$$

where the variables are as described in Table I, sample statistics are given in Table II, $\beta_0 \dots \beta_5$ are the regression coefficients, and e is the residual.

Results are given in Table III.⁴⁸ The DISABLED coefficient is positive and significant in all six equations in which it appears, whether on its own or with other variables held constant.⁴⁹ Particularly in the NEGLECT equations, a child's disability nearly doubles the chance of being mistreated, as can be seen from the line reporting the weighted elasticity.

The presence of a stepparent (STEP) or other romantic interest in the home is certainly significant in predicting mistreatment: it is negatively and significantly related to neglect, and positively and significantly related to abuse. The presence of a stepparent decreased the chances that a child would be neglected by 13 to 14 percent, while it increased the chance that physical (or sexual) abuse would occur by more than 25 percent. This is as expected: when a child competes with an unrelated adult for affection, the child may be seen as "ugly."⁵⁰ On the other hand, the formation of a "new" family eases the financial problems that are closely correlated, here as elsewhere, with neglect.⁵¹

⁴⁸ The excerpted data set, childdec.dif, and the runs themselves, chdec3.out, are available from the authors on request.

⁴⁹ It continues to be significant and positive when considered with STEP alone, or with other variables such as the presence of a grandparent in the home, or with high income.

⁵⁰ See Jones, *supra* note 28, for a thorough discussion of this problem and more empirical evidence (for step-parent abuse). Unlike Jones, however, we would not be surprised to find abuse on the part of the genetic parent as well as the step-parent. See also ROBERT WHELAN, *BROKEN HOMES AND BATTERED CHILDREN* (1993), reporting more than thirty times the number of British abuse cases, 1982-88, where a cohabitant lived with the parent, and 73 times the number of child deaths in such situations.

⁵¹ Notably, all but three of the neglect cases in our data set involved parents with less than the median income (approximately \$13,000 for rural areas and \$17,000 for urban areas) of those in the study. Supplemental Security Income paid to parents of disabled children may prevent some instances of abuse and

Of the other variables, the SEX coefficient was negative but insignificant in the neglect equation, but positive and significant in the ABUSE equation (indicating that girls were more likely to be abused).⁵² The AGE coefficient was positive for both neglect and abuse, but was significant only in the abuse equation. As the child ages, it is easier for the parent to see that she does not measure up to expectations. These findings are consistent with other studies, which report that handicapped children are significantly more likely to be abused than normal children.⁵³

The profile of the neglected child is quite different from that of the abused child, even though both are chosen from among their siblings for abuse by their parents. Though both are likely to be disabled, the neglected child is not likely to have a step-parent (or surrogate) living in the home. The age and sex of the neglected child are not relevant. In contrast, for the abused child, the presence of a stepparent is very important, as is disability. Abused children are significantly more likely to be girls (because, with stepparents, much of the abuse tends to be sexual), and to be among the older children in the family.

IV. RECOMMENDATIONS

To some extent, the problem of ugliness is preventable. Sensory stimulation seems to improve premature infants' appearance and disposition so

neglect. In particular it may relieve some families who would otherwise face the difficult allocation choices faced by the really indigent. Emery & Lauman-Billings, *supra* note 6, at 127 ("well-documented link between poverty and child neglect"). On the other hand, for those families where an adult is inclined to abuse in any event, such payments may act as an excuse for abusive behavior short of murder, for the payments will not continue if the child dies. Though some subsidies cause deadweight loss if they are directed to particular needs (causing most economists to prefer cash transfers), one policy implication of this paper may be that payments to benefit disabled children be made directly to the medical, prosthetic or educational services they need rather than to their parents.

⁵² Owen D. Jones, *Sex Selection: Regulating Technology Enabling The Predetermination of A Child's Gender*, 6 Harv. J. Law and Tec. 1, 10 (1992), argues that there is an overwhelming preference for boy children both in the United States and internationally. For discussions of the international preference, see, e.g., Lucinda Richards, *Controlling China's Baby Boom*, 268 Contemporary Review 5 (Jan. 1996), reporting that the Chinese gender gap represents 1.7 million fewer female babies appearing on Chinese birth records every year than worldwide rates would lead us to expect. There are now 36 million more males than females in China. A surplus of 70 million single men by the end of this century is predicted. See also ELISABETH BUMILLER, MAY YOU BE THE MOTHER OF A HUNDRED SONS: A JOURNEY AMONG THE WOMEN OF INDIA 10 (1990). Bumiller notes that while the birth of a boy is a time for celebration, the birth of a girl is viewed as a crisis. She reports that the cultural preference for boys is so strong that the phrase, "may you be the mother of a hundred sons," is a blessing given to a Hindu woman at the time of her wedding.

⁵³ See, e.g., Shirley Cohen & Rachel D. Warren, *The Intersection of Disability and Child Abuse in England and the United States*, 69 Child Welfare 253, 254 (1990); Linda J. Diamond & Paula K. Jaudes, *The Handicapped Child and Child Abuse*, 9 Child Abuse & Neglect 341 (1985) (for 36 of 86 cerebral-palsied children, the issue of child abuse was an important consideration in the children's care, with custody assumed by the state in 15 cases); Shirley Cohen & Rachel D. Warren, *Preliminary Survey of Family Abuse of Children Served by United Cerebral Palsy Centers*, 29 Developmental Medicine & Child Neurology 12 (1987); Astrid James, *Abuse of Disabled Children*, 341 Lancet 553 (1993).

that they will be perceived as more attractive. Genetic counseling, education, and even surgical intervention may help parents to cope with the birth of a disabled child. For example, some gross deformities can be treated *in utero* or shortly after birth.⁵⁴ But the parents who are willing to take these steps are not likely to be the parents who would abuse their children in any event. For other kinds of ugliness, untreatable or untreated, a further response might be indicated, if the child has been abused. In such cases, we propose a relaxation of the presumption that families should be kept together when there is clear evidence of parental abuse or neglect, and when the child is "ugly," whether because the child is seen as a threat to the parent's romantic interest or whether she is disabled.

At present, parents are strongly presumed to act in the best interests of their children.⁵⁵ The Supreme Court put it this way:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.⁵⁶

Since children are incapable of making wise decisions on their own, someone must take their part. Who better than the parents? Parents may be led to act in their children's best interest simply because they love them.⁵⁷ They may so act because to do otherwise is to invite tremendous social disapprobation.⁵⁸ More simply, the child's best interests may coincide with those of the parents. For example, having a nice home to live in benefits both parent and child.⁵⁹ When

⁵⁴ Some problems such as Jackson-Weiss Syndrome, in which the two sides of a child's body do not "match," may be corrected by surgery. For discussions of this and similar genetic problems, see Natalie Angier, *Family of Errant Genes is Found to Be Responsible for a Variety of Skeletal Ills*, N.Y. Times, Jan. 11, 1994, at C1; Sue Goetinck, *Genetic Studies Target Face, Body Shape*, Dallas Morning News, Nov. 13, 1995; *Limb Abnormalities and C.V.S.*, 347 Lancet 489 (Feb. 24, 1996).

⁵⁵ *In re Phillip B.*, 92 Cal. App. 3d 796, 156 Cal. Rptr. 38 (1979). Phillip is a Down Syndrome child who needed heart surgery his birth parents would not provide. Eventually he was adopted by another couple and received the surgery, without which he would have died probably before reaching age 20.

⁵⁶ *Parham v J.R.*, 442 U.S. 584, 590 (1979).

⁵⁷ Which is not to say that love cannot be explained on economic theories. For an analysis of love as a bonding or commitment device to persuade a partner that one can be trusted to perform one's promises, see ROBERT H. FRANK, *PASSIONS WITHIN REASONS: THE STRATEGIC ROLE OF THE EMOTIONS* ch. 10 (1988).

⁵⁸ Scott & Scott, *supra* note 38, at 2435-36 (1996). They write, "Predictable reactions of outrage follow egregious examples of parental misconduct and even self-interested behavior. Second, popular media attention has focused on the harmful psychological and economic impact of divorce on children, and negative publicity about "deadbeat dads" has been translated into tough child support enforcement legislation. Examples of fathers going to jail or losing professional licenses for failure to pay child support underscore the lesson that parental default is a moral, as well as a legal, violation."

⁵⁹ Yoram Weiss and Robert Willis, *Transfers Among Divorced Couples: Evidence and*

the parents expect their child to support them in their old age or to make them proud, they also have an incentive to make long term investments in the child.⁶⁰

Removing children from their parents, even after evidence of abuse, will often leave them worse off. The children will be harmed by losing the people to whom they are most attached, and there is always a probability that they will be less well cared for in their new home. For this reason, one must be hesitant to interfere with parental prerogatives. For example, it would be ludicrous to subject parents who discipline their children with spankings to the supervision of twenty-two year old social workers. This concern with too much intervention helps explain recent moves to strengthen parental rights by restricting the ability of the state to take children from their homes or otherwise second-guess parenting.⁶¹

Nevertheless, we suggest that the pendulum has swung too far in the direction of parental rights. It has become extremely difficult to prove permanent parental unfitness.⁶² More to the point, children, including the ones in the study reported here, are often returned to their parents after quite horrifying examples of abuse.⁶³ The first impulse of the current system has been to try to "cure" the problem through the provision of social services, such as counseling, to the families.⁶⁴

Interpretation, 11 *Journal of Labor Economics* 629 (1993).

⁶⁰ Brinig, *supra* note 15.

⁶¹ This is not to say that values of pluralism or the respect for general parental decision making should be ignored. *See, e.g.*, In Interest of Aaronson, 382 N.E.2d 853 (Ill. App. 1978), where the appellant beat his children by striking them on the buttocks with a belt and board. The court held, "Paddling one's own children cannot be the basis of a charge of child abuse and neglect in the absence of clear evidence the paddling was vicious or for other than disciplinary reasons." *See generally* the debate between MICHAEL S. WALD, J.M. CARLSMITH, & P. LEIDERMAN, PROTECTING ABUSED AND NEGLECTED CHILDREN 183-84 (Stanford U. Press, 1988); and Marsha Garrison, *Child Welfare Decision making: In Search of the Least Drastic Alternative*, 75 *Geo. L.J.* 1745 (1987). The Parental Rights and Responsibilities Act of 1995, S. 984, was introduced to protect parents who for religious or moral reasons wish less state intervention into their decision making. There are limits to pluralism defenses, of course. *See, e.g.*, Lori Ann Larson, *Female Genital Mutilation in the United States: Child Abuse or Constitutional Freedom?* 17 *Women's Rights L. Rep.* 237 (1996).

⁶² Regardless of substantive standards, the parent has impressive due process protections. *See, e.g.*, *M.L.B. v. S.L.J.* 136 L. Ed. 2d 473 (1996) (parent's right to free transcript); *Santosky v. Kramer*, 455 U.S. 745 (1982) (enunciating a "clear and convincing" evidence standard before making the finding of abuse); *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18 (1981) (parent's right to court-appointed counsel in termination proceedings on a case by case basis).

⁶³ The Institute of Judicial Administration and the American Bar Association's Juvenile Justice Standards Project: Standards Relating to Abuse and Neglect [hereinafter Institute Standards], allows termination of parental rights after physical abuse only when "[t]he child has been removed from the parents previously, has been returned to his/her parents, has been found to be endangered a second time, requiring removal, has been out of the home for at least six months, and there is a substantial likelihood that sufficient legal justification to keep the child from being returned home . . . will continue to exist in the foreseeable future." Standard 8.4(C)(2). Obviously this requires at least two proven instances of abuse plus a substantial time in foster care.

⁶⁴ *See, e.g.*, Douglas Besharov, *Combating Child Abuse: Guidelines For Cooperation Between Law Enforcement and Child Protective Services*, at 2-6 (1990).

In the famous example of the Supreme Court case of *DeShaney v. Winnebago County Department of Social Services*,⁶⁵ Joshua was three times admitted to a hospital with multiple bruises and abrasions, including head injuries. Social workers investigated these incidents, but always returned the child to his father. The child's stepmother and neighbors often told the police that they had seen or heard the father or the father's lover beating Joshua. A social worker visited the home nearly 20 times, and later testified that "I just knew the phone would ring some day and Joshua would be dead." The father finally beat the boy into a coma, from which he suffered brain damage so severe that he is expected to spend the rest of his life in an institution for the profoundly retarded.⁶⁶

In New York, a three-year-old boy, whose father kicked him to death, had been removed from his home three times in the ten months prior to his death. However, authorities returned him to the home each time despite reports from his grandmother, doctors, and day-care teachers that he was being abused.⁶⁷ Also in New York, in 1986, one third of the 112 children who died of child abuse had families that the city had previously investigated.⁶⁸

In a recent Maryland case,⁶⁹ a father whose son had been previously removed because of his neglect was eventually returned to the father and his new girlfriend. The father and "stepmother" had a daughter of their own, and various authorities began to suspect that the son was being abused. When a third child died at home, neighbors who took care of the two older children reported that the five year old boy was ravenously hungry and that his younger half-sister repeatedly bit him. He had been tied to a bedpost with a cat leash for up to 22 hours a day, and had been intentionally burned and starved by the girlfriend who worried that he was interfering with her relationship with the boy's father.

The greater procedural protections required to protect the parents' constitutional rights and the increased number of reported cases of abuse have

⁶⁵ 489 U.S. 189 (1989).

⁶⁶ *DeShaney v. Winnebago County Dept. Soc. Servs.*, 489 U.S. 189 (1989). See also *In Interest of Cook*, 304 N.W.2d 390 (Nev. 1981).

⁶⁷ See Timothy Egan, *Child Abuse Cases Draw New Attention*, N.Y. Times, January 1, 1988, at A5, col. 1.

⁶⁸ Gary Langer, *Saddest Tragedies of Child Abuse: Preventable Cases*, L.A. Times, Dec. 13, 1987, Section 1, at 2, col. 1. See generally Lorene Fuerbach Schaefer, *Abused Children and State-Created Protection Agencies: A Proposed Section 1983 Standard*, 57 U. Cinn. L. Rev. 141 (1989); see also Child Fatality Review Panel: Annual Report for 1993, New York City Human Resources Administration (1995) (20 percent of the fatalities in New York County in 1993 occurred within "client" families).

⁶⁹ See, e.g., Steve Vogel, *Woman Convicted of Abusing Boy, 5, Montgomery Judge Calls Imprisonment, Other Treatment 'Bizarre' and 'Malicious'*, The Washington Post, Nov. 15, 1997, at B1; Steve Vogel, *'Mommy Put a Leash on Them,' Social Worker Recalls Boy's Explanation for Marks on Feet, Other Injuries*, Washington Post, Nov. 7, 1997, at B7.

increased the social work caseload, while the resulting lack of attention to individual cases has in turn contributed to the mounting crisis in child abuse.⁷⁰ Child abuse has also increased as a consequence of an upswing in drug dependencies and related pathological behavior amongst parents. Finally, the increase in child abuse has come at a time of declining local government revenues, and a reduction in the budgets of many social welfare agencies.⁷¹

One of the most serious problems of excessive deference to so-called "birth" or "natural" parents arises when their claims conflict with those of adoptive parents. In recent years, courts have extended the power of natural parents to retake children who had been given up for adoption.⁷² In the much-publicized Baby Jessica case, *Schmidt v DeBoer*,⁷³ parental rights trumped those of adoptive parents of two years' standing, at a tremendous cost to the child involved. This case illustrates the expansive power of natural parents, particularly unwed fathers like Jessica's, to withhold consent for adoption. In that case, the natural father's consent was not sought because he was not identified by the natural mother.⁷⁴ Despite the fact that the problem was not caused by misfeasance on the part of child welfare authorities, and the long delay before final decision, the child was taken from the adoptive parents.⁷⁵

We suggest that the presumption of parental supremacy is too strong, and that greater attention should be given to rescuing children from abusive parents. Such a change was recently enacted by the federal Adoption and Safe Families

⁷⁰ Douglas L. Besharov & Lisa Lauman-Billings, *Don't Call it Child Abuse if it's Really Poverty*, 3 J. Children & Poverty 5 (1997); Emery & Lauman-Billings, *supra* note 6, at 125. One of the classic articles on the subject is Robert H. Mnookin, *Foster Care: In Whose Best Interest?*, 43 Harv. Educ. Rev. 4 (1973). See also John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. Fam. L. 149 (1985-86); Marsha Garrison, *Child Welfare Decision making: In Search of the Least Drastic Alternative*, 75 Geo. L.J. 1745 (1987).

⁷¹ For example, see the following, quoted in Wells, et al. v. Maryland, 642 A.2d 879, 889 (Md. App. 1994):

The crisis that threatens the nation's children has evolved because society has neglected and abused the legal rights of children. Society has failed to protect children of all ages and socio-economic groups, not just those who are poor, hail from inner cities or are members of racial minorities. At every age, among all races and income groups, in communities nationwide, many children are at risk every day. Compounding these risks are the deficiencies of those agencies, institutions and advocacies that are designed to help. Children have become victims of a failing social and judicial system.

Evelith, *The Plight of Our Children*. XX VII Maryland Bar Journal (No. 3 May/June 1994).

⁷² Stanley v Illinois, 405 U.S. 645 (1972).

⁷³ 442 Mich. 648, 502 N.W.2d 649 (1993).

⁷⁴ The court ruled that "While a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit." *Id.* at 657, 687, 502 N.W.2d at 652, 665-66.

⁷⁵ Although the birth father was unsuccessful, a recent Supreme Court case upheld a statute conclusively presuming legitimacy when a child was conceived during a lawful marriage. Michael H. v Gerald D., 491 U.S. 110 (1989).

Act of 1997, signed by President Clinton in November of 1997, which allows states to add the protection of the child to the goal of reuniting the family.⁷⁶ In response, states are now changing some of their rules, though they have little guidance on how best to protect children.⁷⁷ Even though as it has placed new emphasis on the child's well-being, Congress has asked for more studies to show which families should be reunified and which dissolved. To this end, we suggest that the "ugliness" of a child might be considered as a factor in the dependency⁷⁸ or termination decision.⁷⁹

Our proposed change might have prevented many tragic cases of abuse that have occurred where an ugly child was returned to his parents after serious abuse.⁸⁰ Such cases include a disabled child who was killed for being unable to tell time after an intervention by social services,⁸¹ a step-father who tortured his

⁷⁶ P.L. 105-89, 105th Congress, 1997 H.R. 867. The act provides in Sec. 2 (a)(ii),(iii) that the "reasonable efforts" to reunify the family will not be necessary where the child has been subjected to aggravated circumstances, as defined by state law, and including abandonment, torture, chronic abuse and sexual abuse, or where the parental rights with respect to a sibling have been terminated involuntarily. States must initiate or join proceedings to terminate parental rights when children under 10 have been in foster care for 18 months of the most recent 24 months, unless the child is being cared for by a relative or the state documents a compelling reason for determining that filing a termination petition would not be in the best interests of the child, or the state has failed to provide to the child's family such services as the state deems appropriate. Id. Sec.3. See also Section 40.001, Texas Human Resources Code, effective September 1, 1997, which recognizes the authority of parents to direct the education and upbringing of their children, but state that this recognition "does not include the provision of state social services for the rehabilitation of parents convicted of abusing or neglecting their children."

⁷⁷ See, e.g., VA. CODE ANN. §§ 16.1-248,1 et seq. (Amended 1998, and effective July 1, 1998).

⁷⁸ The dependency proceeding follows a finding of abuse, neglect, or abandonment. The state assumes temporary custody of the child, and is expected to file a "foster care plan" and provide social services enabling the family to be speedily reunited. Because the risk of improper placement can be corrected by later action, the burden of proof varies from a mere preponderance of the evidence. See, e.g., MONT. CODE ANN., § 41-3-404 (1997); Wright v. Arlington County Dept. of Social Servs., 90 Va. App. 411, 388 S.E.2d 7 (1990); to "clear and convincing evidence," to clear and convincing evidence, see CAL. WEL. & INST. CODE § 361 (1996); OR. REV. CODE ANN. 2151.35 (Anderson 1997).

⁷⁹ Like the dependency proceeding, the termination proceeding follows a finding of abuse, neglect or abandonment. The parent's natural rights in the child are terminated, and the child freed for adoption or other permanent placement. Because of the drastic and permanent nature of the decision, the state must prove that it has complied with the foster care plan required by the dependency order in a proceeding with very substantial due process protection given to the parent threatened with termination. See, e.g., Institute Standards, *supra* note 63, §§ 8.3(6) through (16)(notice, confrontation and opportunity to be heard, appointment of counsel at public expense for parent and child, interpreters, discovery appointment of independent experts (at public expense), subpoenas, public access to the proceeding, the clear and convincing burden of proof, legally relevant and competent evidence, and written findings).

⁸⁰ See Emery & Lauman-Billings, *supra* note 6, at 131, citing Lung and Darro for the proposition that between 35 and 50% of all fatalities due to child abuse or neglect occur in cases that have already been brought to the attention of law enforcement and child protective agencies. Ching-Tung Lung & Deborah Darro, Current Trends in Child Abuse Reporting and Fatalities: The Result of the 1995 Annual Fifty State Survey (1996).

⁸¹ See, e.g., Horwitz, *supra* note 20.

step-daughter after temporarily losing custody,⁸² and an in-the-way child beaten into a permanent vegetative state by his father.⁸³ A recognition that "ugly" children might be continued targets for parental abuse might also have led to a different result in many landmark decisions, including *Santosky v. Kramer*,⁸⁴ *Lassiter v. Department of Social Services*,⁸⁵ and *M.L.B. v. S.L.J.*⁸⁶ In all of these cases, parental rights were terminated without proper procedural protections, according to the Supreme Court, and in all, the Court supported stronger procedural protections to protect the *parent* against mistakes.

As broad custody norms never work perfectly, they will always impose a cost on some children. Even a strict rule may be under-inclusive and permit a child to return to parents who later seriously abuse him. And even a lax rule may be over-inclusive, and permanently take children from parents who would have raised him well.⁸⁷ Taking "ugliness" into account will increase the costs of over-inclusiveness: more disabled children will be taken from fit parents. But as we believe that present termination rules are too lax,⁸⁸ we suggest that under-inclusiveness costs, including permanent damage to children, are a far greater concern than those of over-inclusiveness.

Even if the two kinds of costs were perfectly equilibrated, it would still be desirable to take into account the attributes of the children which pre-dispose their parents to abuse them. By itself, mere ugliness—whether caused by disability or the problems of a so-called "blended family"—should never alone be a reason

⁸² See, e.g., Brian Mooar, *Fla. Jury Convicts Man in Stepdaughter's Death*, Wash. Post, November 19, 1996 at B1.

⁸³ *DeShaney v. Winnebago Co. Dept. of Soc. Servs.*, 489 U.S. 189 (1989).

⁸⁴ 455 U.S. 745 (1982).

⁸⁵ 452 U.S. 18 (1981).

⁸⁶ 117 S. Ct. 555 (1996).

⁸⁷ These problems are discussed at length in CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW ch. X, and especially pages 964–68, and in Ch. IX, pages 773–799 (1995); Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best Interest Standard*, 89 Mich. L. Rev. 2215 (1991) Marsha Garrison, *Why Terminate Parental Rights*, 35 Stan. L. Rev. 423 (1983); AARON BARAN, *JUDICIAL DISCRETION* (1989); D.J. GALILEAN, *DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION* (1990). For a study of the general problems of discretion in child custody proceedings, see Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & Contemp. Probs. 226 (1975).

⁸⁸ For example, see NY CLS Soc Serv § 384-b (1997).

1. Statement of legislative findings and intent.

(a) The legislature hereby finds that:

- (i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;
- (ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;
- (iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home. . . .

to alter family arrangements, for then the “ugly” child would be doubly harmed by losing the emotional support of her parents. But when the parents have put their love into question by abusing the child, her ugliness should reasonably be taken into account as a factor suggesting the likelihood of continued abuse. We therefore suggest that child protective laws be amended to provide that, after a finding of serious abuse or neglect, a court may take into account the attributes of the child which appear to have contributed to the mistreatment and which make continued parental abuse more likely.

We do not believe that the substantive changes we propose will result in excessive intervention for another reason. State termination proceedings must comply with due process standards under the Fourteenth Amendment. As interpreted by the Supreme Court, this requires a “clear and convincing” determination of parental unfitness.⁸⁹ As the Court wrote in *Santosky*, “the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.”⁹⁰

We caution, however, that our proposal is restricted to the most serious forms of abuse. There are many different ways to raise a child, and short of serious physical abuse one must be leery of second-guessing parental decisions.⁹¹ In particular, standards for coercive intervention should take cultural differences into account.⁹² The fact that the vast majority of the children in the Cornell data set who were neglected were also poor suggests that one appropriate role for government may be providing the medical and educational resources the child needs.

There is another reason why we would restrict our proposal to serious abuse. The same attributes which made their parents reject the child — her ugliness—may also lead the adoptive parents to give up on her. This is

⁸⁹ *Santosky v. Kramer*, 455 U.S. 745 (1982). The “clear and convincing” standard lies between the “preponderance of the evidence” and “beyond a reasonable doubt” tests.

Courts distinguish between custody and termination of parental rights. A parent usually loses temporary custody after a dependency proceeding to a social services agency without losing all parental rights. Sometimes, though very rarely, a fit parent will not prevail in a custody case against to a non-parent, *see, e.g.*, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995). The question of termination of parental rights usually arises when the child is to be adopted. At this stage, not only abuse but an irremediable condition must be shown by the state.

⁹⁰ *Santosky* 455 U.S. at 769 (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

⁹¹ Institute Standards, *supra* note 63, at § 1.4. *See also* JILL E. KORBIN, *CHILD ABUSE AND NEGLECT: CROSS CULTURAL PERSPECTIVES* (1981).

⁹² Parental rights are not to be terminated simply because a family is indigent, or when language difficulties and problems with cultural acclimation significantly affected a parent’s ability to function properly. *Edwards v. County of Arlington*, 5 Va. App. 294, 361 S.E.2d 644 (1987).

particularly true where the adoptive parents might not have fully appreciated what they were undertaking.⁹³ In our sample, only ugly (disabled) children were abused by adopted parents. A total of 14 families had adopted children, and of these four had children who were disabled. Three of these four abused the children. Two of these three had other adopted children, non-disabled, who were not abused. This argues for special attention as to the fitness of adoptive parents when the child is ugly,⁹⁴ and a higher degree of post-adoption monitoring. Nevertheless, we continue to believe that ugliness should be a factor in terminating the rights of natural parents. According to the biological theories discussed above, natural parents (and, after them, other relatives)⁹⁵ are almost always to be preferred to adoptive parents. But this presumption appears weaker when the child is disabled, and may be perceived by his parents, even on a very basic level, as a defective agent for the transmission of their genes. In such cases, a finding of serious abuse is tantamount to a finding that the parent's "selfish gene" has abandoned the child's replicated gene. In the "stepparent" cases, the new romantic interest may bring in children who seem "more fit" even to the genetic parent because their other parent lives in the home. Alternatively, the stepparent may abuse because there is no genetic connection with the child.

The problem we address is particularly pressing because many of the children currently awaiting adoption are disabled.⁹⁶ There is therefore a special concern for screening the fitness of parents who agree to adopt disabled children. In addition, such adoptive parents might reasonably be offered greater financial support in the form of child allowance subsidies.⁹⁷ As we mentioned earlier, neglect is very strongly correlated with lack of financial resources.

⁹³ Some special needs adoptions are quite successful. James A. Rosenthal & Victor Groze, *Special-Needs Adoption: A Study of Intact Families*, 64 Social Service Review 475 (1990). But the incidence of disruptions is much higher in special-needs adoptions than in infant adoptions. Anne Westhues & Joyce S. Cohen, *Preventing Disruption of Special-Needs Adoptions*, 69 Child Welfare 141 (1990).

⁹⁴ For disturbing account of the difficulties in placing disabled children, see Richard J. Delaney & Frank R. Kunstal, *Troubled Transplants: Unconventional Strategies for Helping Disturbed Foster and Adoptive Children* National Child Welfare Resource Center for Management and Administration, Edmund S. Muskie Institute of Public Affairs, University of Southern Maine, 1993. There are organizations dedicated to promoting adoption of such children, and many of these can be located on the Internet. See, e.g., <http://www.aask.org>, which has links to other agencies. For a general discussion of special needs adoption and the problems of returning abused children to their parents, see Conna Craig, *What I Need is a Mom*, Policy Review, Summer 1995, Number 73.

⁹⁵ For an influential discussion of transracial adoption, see ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING. Rebecca Hager & Maria Scannapieco, *From Family Duty to Family Policy: The Evolution of Foster Care*, 74 Child Welfare 200 (1995).

⁹⁶ One study reported that 82 percent of the children awaiting adoption have special needs. Child Welfare League of America, *The State of Adoption in America*, reported in Children Today 3 (May-June 1989).

⁹⁷ James A. Rosenthal, *Outcomes of Adoption of Children with Special Needs*, 3 The Future of Children 77 (1993). Rosenthal notes that adoptions of disabled children rare as successful as those of normal children when the children are adopted before age three.

V. CONCLUSION

Anderson's "The Ugly Ducking" offers a message of hope to the ugly or unwanted child. He is taught that in time he will become attractive, and that he will then be accepted and loved.

The poor swan was so happy he did not know what to do, but he was not at all proud. He had been hated for being ugly, and now he heard them say that he was the most beautiful of all the birds. He rustled his feathers and curved his slender neck, and said, "Now, when people see me they will not be angry, they will be glad. I never dreamed of such happiness when I was an ugly duckling."

But when the child is seriously abused, he is unlikely to see the happy ending. He is apt to be abused repeatedly and to suffer severe psychological damage.⁹⁸ In these circumstances, we suggest a relaxation of presumptions of parental fitness. We have found that disability and the presence of an genetically unrelated adult in the home—two measures of ugliness—are significantly correlated with abuse in a econometric study of abused children. Where the abuse has been serious and clearly demonstrated, then, there is no longer good reason to suppose that the ugly child will be best off in the custody of his natural parents. More generally, we suggest that setting the proper balance between autonomy and intervention in families requires a multidimensional—and multi-disciplinary inquiry.⁹⁹ We hope we have helped make the case for such work.

⁹⁸ See generally RICHARD J. DELANEY AND FRANK R. KUNSTAL, *TROUBLED TRANSPLANTS: UNCONVENTIONAL STRATEGIES FOR HELPING DISTURBED FOSTER AND ADOPTIVE CHILDREN* 7-8, 14 (1993).

⁹⁹ Such an effort is also called for by Temporary Commission of Investigation of the State of New York, in *Secrets That Can Kill: Child Abuse Investigations in New York State* (1997).

Table I. Description of Variables

<i>DISABLE_i</i>	Dummy identifying whether child <i>i</i> was disabled before the abuse. The disabilities in the cases studied primarily include mental retardation, developmental delay, hyperactivity/attention deficit disorders, learning disabilities, emotional disturbances, and orthopedic problems. <i>See AH05 Codebook, The Maltreatment of Children with Disabilities Study.</i>
<i>AGE_i</i>	Age of child <i>i</i> at the time of abuse
<i>SEX_i</i>	Sex of child <i>i</i> , where 1=female
<i>STEP</i>	Stepparent, adoptive parent or cohabitant present in home (0=no stepparent present)
<i>ABUSE</i>	As defined by the Cornell study, abuse includes physical assault, sexual abuse, or emotional abuse. <i>See CHILD068.</i>
<i>NEGLECT</i>	As defined by the Cornell study, neglect includes physical, medical, educational or emotional neglect, abandonment, expulsion, inadequate nurturance, refusal of psychological care, and drug or alcohol toxicology or abuse
<i>SEXAGE</i>	Interacter variable, where the child's gender is multiplied by the child's age

Table II. Descriptive Statistics

NAME	MEAN	STD. DEV	VARIANCE	MINIMUM	MAXIMUM
DISABLED	0.15094	0.3588	0.12877	0.00000	1.0000
AGE _i	8.0613	4.9010	24.020	0.00000	17.000
SEX _i	0.47170	0.50038	0.25038	0.00000	1.0000
STEP	0.28774	0.45378	0.20592	0.00000	1.0000
ABUSE	0.31604	0.46603	0.21718	0.00000	1.0000
NEGLECT	0.09434	0.29299	0.085845	0.00000	1.0000
SEXAGE	3.8538	5.3752	28.893	0.00000	17.000

N=212.

Table III. Selective Abuse in Families.

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Variable Name	(1) Probit- Neglect (20 cases)	(2) Probit- Neglect (20 cases)	(3) Probit- Neglect (20 cases)	(4) Probit- Abuse (67 cases)	(5) Probit- Abuse (67 cases)	(6) Probit- Abuse (67 cases)
Disabled	1.5265 (5.42)**	1.5491 (5.223)**	1.5475 (5.086)**	0.47821 (1.969)**	0.70448 (2.685)**	0.71907 (2.737)**
Step		-0.84276 (-2.00)**	-0.92744 (-2.09)**		0.85623 (4.117)**	0.76962 (3.730)**
Child's Age			0.0010 (0.03085)			0.053656 (2.677)**
Child's Sex			-0.48651 (-1.6362)			0.47935 (2.446)**
Sex*Age		-0.02909 (-1.0143)			0.078756 (4.416)**	
Constant	-1.7637 (-10.3)**	-1.5212 (-7.44)**	-1.4129 (-4.61)**	-0.557 (-5.63)**	-1.1987 (-7.45)**	-1.5257 (-6.16)**
N	212	212	212	212	212	212
R2 (Maddala)	0.1322	0.1574	0.1641	0.01804	0.1595	0.1327
Elasticity- Disabled	0.94735	0.89470	0.87783	0.09083	0.10988	0.11861
Elasticity- Step		-0.13360	-0.14435		0.30416	0.26089

NOTES: T-statistics are denoted with an ** if significantly different from zero at the .05 level (two-tailed test), and with a * at the .1 level.

